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No. 904

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

FRANKLIN MCKENZIE DAVISON, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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IN THE

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No. .

FRANKLIN MCKENZIE DAVISON, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Franklin McKenzie Davison, by his counsel, prays that a writ of certiorari issue to review the judgment entered in this case by the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The findings of fact and opinion of the District Court (R. ii; Appellant's Appendix, pp. 1-5) are reported at F. Supp. , 7 AFTR 2d 961. The opinion of the Court of Appeals is reported at F. 2d , 9 AFTR 2d 848 and appears in the Appendix, *infra*, pp. 1a-7a.

JURISDICTION

The judgment of the Court of Appeals (App., *infra*, 8a) was entered on February 7, 1962. Petition for rehearing was filed on March 3, 1962 and was denied by order of the Court of Appeals on March 22, 1962 (App., *infra*, p. 9a). The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254.

QUESTIONS PRESENTED

1. Whether the relief provisions of the Current Tax Payment Act of 1943 by implication repealed the six-year statute of limitations provided in 1939 IRC 276(c) for collection of reported and assessed income tax liability so that more than Five Billion Dollars of assessments, plus interest, including the 1942 interest involved in this case, may be collected until the Doomsday end of time?

2. Whether the Commissioner was required by 1939 IRC 273(a) to include, and did include, all 1942 liability in jeopardy assessments which been have fully paid, plus interest?

STATUTES INVOLVED

Section 276(c) of the Internal Revenue Code of 1939 provides:

> "*Collection after assessment.*—Where the assessment of any income tax imposed by this chapter has been made within the period of limitation properly applicable thereto, such tax may be collected by distraint or by a proceeding in court, but only if begun (1) within six years after the assessment of the tax, or (2) prior to the expiration of any period for collection agreed upon in writing by the Commissioner and the taxpayer before the expiration of such six year-period. The

period so agreed upon may be extended by subsequent agreements in writing made before the expiration of the period previously agreed upon."

Section 273(a) and (b) of the Internal Revenue Code of 1939 provide:

"273. *Jeopardy assessments.*—(a) *Authority for making.*—If the Commissioner believes that the assessment or collection of a deficiency will be jeopardized by delay, he shall immediately assess such deficiency (together with all interest, additional amounts, or additions to the tax provided for by law) and notice and demand shall be made by the collector for the payment thereof.

"(b) *Deficiency letters.*—If the jeopardy assessment is made before any notice in respect of the tax to which the jeopardy assessment relates has been mailed under section 272(a), then the Commissioner shall mail a notice under such subsection within sixty days after the making of the assessment."

Section 6(a) of the Current Tax Payment Act of 1943, (c. 120, 57 Stat. 126) provides (1943 Prentice-Hall Federal Tax Service, par. 18,082):

"CURRENT TAX PAYMENT ACT OF 1943—SEC. 6 RELIEF FROM DOUBLE PAYMENTS IN 1943.—

"(a) *Tax for 1942 Not Greater Than Tax for 1943.*—In case the tax imposed by Chapter 1 of the Internal Revenue Code upon any individual (other than an estate or trust and other than a nonresident alien not subject to the provisions of sections 58, 59 and 60 of such chapter) for the taxable year 1942 (determined without regard to this section, without regard to interest or additions to the tax, and without regard to credits against the tax for amounts withheld at source) is not greater

than the tax for the taxable year 1943 (similarly determined), the liability of such individual for the tax imposed by such chapter for the taxable year 1942 shall be discharged as of September 1, 1943, except that interest and additions to such tax shall be collected at the same time and in the same manner as, and as a part of, the tax under such chapter for the taxable year 1943. In such case if the tax for the taxable year 1942 (determined without regard to this section and without regard to interest or additions to the tax) is more than $50, the tax under such chapter for the taxable year 1943 shall be increased by an amount equal to 25 per centum of the tax for the taxable year 1942 (so determined) or the excess of such tax (so determined) over $50, whichever is the lesser. This subsection shall not apply in any case in which the taxpayer is convicted of any criminal offense with respect to the tax for the taxable year 1942 or in which additions to the tax for such taxable year are applicable by reason of fraud."

STATEMENT

Mr. Davison filed his Federal income tax return for 1942 on March 15, 1943. The 1942 return reported liability of $39,267.11 which was duly assessed in April 1943 in Assessment Account No. 22780 (Stip. Par. 1; R. 6-7).

Alleged fraud with respect to unreported liability was discovered in 1947, indictment was secured in 1949 and conviction was had on April 5, 1950 (Stip. Par. 6; R. 7).

After Mr. Davison had paid the fine and served the prison sentence imposed, the Commissioner advised him as to his alleged liability for 1942 through 1947 by the imposition of jeopardy assessments on November 21, 1951 followed by Final Determination (90-Day

Letter) on December 14, 1951. The jeopardy assessments and Final Determination covered "Total tax, penalties and interest" in the amount of $220,123.46 for the years 1942 through 1947 (Stip. Pars. 7, 8; R. 7-8). The Final Determination stated that the jeopardy assessments included the "Balance (Reassessed portion of 1942 tax)" in the total $220,123.46 liability which was admittedly paid in full, plus interest, for all years through 1946 (Stip. Par. 10; R. 8).

Mr. Davison has paid every penalty imposed by law for tax fraud, i.e., fine, imprisonment and all civil penalties. Further, admittedly, with respect to the reported 1942 liability, assessed in April 1943, he has paid 150% thereof designated to be such 1942 liability, as follows:

1. He made a first 25% payment of $9,816.77 on March 15, 1943 (Stip. Par. 3; R. 7).

2. He made a second 25% payment of $9,816.78 in June of 1943 (Stip. Par. 4; R. 7).

3. He made a third 25% payment of $9,816.78 by reporting on his 1943 return and paying $9,816.78 of 1942 liability against the balance of the $39,267.11 assessed against him for 1942 (Stip. Par. 5; Line 19(c) on page 4 of Mr. Davison's 1943 return; R. 7, 20).

4. In the course of settling the Commissioner's Final Determination (90-Day Letter) dated December 14, 1951, covering the years 1942 through 1947, Mr. Davison on December 31, 1952 made a fourth 25% payment of $9,816.78, plus interest, specifically stated and billed against him as constituting the "Balance (Reassessed portion of 1942 tax)" (Stip. Pars. 9, 12; R. 8, 9).

5. In December of 1953 Mr. Davison made a fifth payment of 50% of 1942 liability in the amount of $19,633.56, plus interest (Stip. Par. 14; R. 9).

In disregard of the original assessment of April 1943 and the reassessment in the jeopardy assessments of 1951, after the time within which Mr. Davison could appeal to the Tax Court had expired, the Commissioner proceeded to make a further reassessment on May 2, 1952 equal to 50% of the previously reported 1942 liability which had been assessed in 1943 and again reassessed in 1951. Despite the fact that all three of these assessments were paid, the Government, nevertheless, instituted an action on May 1, 1958 to collect another 50% of the 1942 reported and assessed liability in the amount of $19,633.56. When Mr. Davison was able to demonstrate that on any theory all three assessments for 1942 had been paid, the Government abandoned its original action for 1942 principal liability but still sought to collect interest on 50% thereof and has been sustained by the Court below (Stip. Par. 14; R. 9).

The grounds upon which Mr. Davison refused to make further payments of 1942 liability after having already made a 50% overpayment with respect thereto are, *first*, that 1942 liability has been overpaid, *second*, that even if it had not been paid its collection was clearly barred by the six-year statute of limitations provided in 1939 IRC 276(c) when this action was commenced *more than 15 years after the assessment* of April 1943 and, *third*, that in any event all known legally collectible liability was mandatorily required by 1939 IRC 273(a) to be included in the jeopardy assessment.

In deciding against Mr. Davison the Court of Appeals has grounded its decision on the opinion in the companion *Hardy* case. Thus, the Court has made three basic errors, as follows:

1. It has been held that although admittedly Mr. Davison has paid 150% of the 1942 liability as designated by the Commissioner, the payment pursuant to the jeopardy assessment and Final Determination did not count because, allegedly, the 1942 liability paid thereunder was "erroneously labeled" and should have been considered to be 1943 liability. This conclusion is demonstrably wrong because had this been 1943 liability there would have been a substantial overassessment for that year and, of course, no fraud penalty could have been imposed. Further, the inclusion in the jeopardy assessment or collection of any such 1943 liability would have been in direct violation of 1939 IRC 3746(c).

2. In reaching its conclusion that "a jeopardy assessment does not purport to be a final statement of a balance due the Government" the Court overlooked the sole authority for jeopardy assessments contained in 1939 IRC 273(a). That section mandatorily requires that in the case of jeopardy assessments the Commissioner "shall immediately assess" all deficiency, all interest, all additional amounts, and all additions to the tax. Clearly, the Commissioner is not authorized to omit alleged liability and make a further assessment with respect thereto after the time to appeal to the Tax Court has expired. The Court mentioned only 1939 IRC 273(c) which deals with a situation not existing in this case, namely, the imposition of a jeopardy assessment after a deficiency notice has been sent. Even in such a situation the Commissioner

is required to include all known liability in the jeopardy assessment regardless of the amount that may have been included in the deficiency notice. See 1939 IRC 273(c) and Regulations 111, Section 29.273-1.

3. The most serious and far reaching error is the Court of Appeals' holding, in direct conflict with decisions of the Supreme Court, that the relief provisions of the Current Tax Payment Act of 1943 repealed by implication the six-year statute of limitations of 1939 IRC 276(c) and thereby authorized the collection of more than Five Billion Dollars of reported and assessed tax, plus interest, until the Doomsday end of time without any limitation thereon whatsoever. This error of major magnitude has been made despite the fact that the Court of Appeals found that Congress did not "deal with the problem here presented" and that if "the Act and Section 276(c) are read together and interpreted literally" it "would follow from a strict construction of the statutes" that the Current Tax Payment Act of 1943 did not repeal the six-year statute of limitations provided in 1939 IRC 276(c). Nevertheless, the Court of Appeals held that the relief provisions of the Current Tax Payment Act of 1943 apply only for the purpose of repealing by implication the six-year statute of limitations.

Under the Current Tax Payment Act of 1943 Five Billion, Seven Hundred Forty-One Million, Two Hundred Eighty Two Thousand ($5,741,282,000.00) Dollars of reported and *assessed* income tax liability was not collected. See *United States Treasury Department, Statistics of Income for 1943, Part 1 (1950 Edition)*, pages 47-51. The Court of Appeals has held that the statute of limitations on collection of these assessments, plus interest, is removed forever.

REASONS FOR GRANTING THE WRIT

1. The Court of Appeals has held that although the Current Tax Payment Act of 1943 did not deal with the statute of limitations it, nevertheless, by implication repealed the six-year statute of limitations for collection of assessed tax so that more than Five Billion Dollars of assessments, plus interest, may be collected at any time. This holding is in direct conflict with decisions of the Supreme Court and a more important problem has never arisen under the Internal Revenue Code.

In *Rothensies* v. *Electric Storage Battery Co.*, 392 U.S. 296, 91 L. Ed. 296, 329 U.S. 296, 35 AFTR 297 (1946) this Court stated that it "would be all but intolerable" to "have an income tax system" without a statute of limitations to prevent controversies "for ever and a day."

In *United States* v. *Updike*, 281 U.S. 489, 74 L. Ed. 984, 8 AFTR 10916 (1930) the Court held that even in a case where no return was filed, once an "actual assessment" is made the six-year statute of limitations must apply. The Court stated that "to allow an indefinite time" for collection "would be out of harmony with the obvious policy of the act" and explained:

> "* * * Where, in a 'no return' case, an assessment which, under paragraph (a) may be made at any time, has in fact been made, a proceeding to collect must be begun within six years thereafter; * * * In such case to allow an indefinite time for proceeding to collect the tax would be out of harmony with the obvious policy of the act to promote repose by fixing a definite period after assessment within which suits and proceedings for the collection of taxes must be brought."

The decision below is in direct conflict with the position always taken by this Court as enunciated in *United States* v. *Updike, supra,* and *Rothensies* v. *Electric Storage Battery Co., supra.*

It should be noted that there can never be fraud with respect to reported and assessed liability. Moreover, fraud has no bearing upon the six-year limitation for collection of *assessed* liability. Mertens, *Law of Federal Income Taxation,* Section 57.79, succinctly states the rule enunciated by the Supreme Court, as follows:

> "* * * * This six-year period is exclusive. Where assessment has been made it supersedes the unlimited period for collection even in the case of a fraudulent return. After the making of a valid assessment the Government must bring an action for collection within six years. * * *"

The Court of Appeals found that the Current Tax Payment Act of 1943 did not "deal with the problem presented" here as to the statute of limitations. Nevertheless, the Court held that the statute of limitations was repealed by implication. This, again, is in direct conflict with the decisions of the Supreme Court. The controlling principle is stated by this Court as follows:

> "In the interpretation of statutes levying taxes it is the established rule not to extend their provisions, by implication, beyond the clear import of the language used, or to enlarge their operations so as to embrace matters not specifically pointed out. In case of doubt they are construed most strongly against the government, and in favor of the citizens." Gould v. Gould, 245 U.S. 151, 62 L. Ed. 211, 38 S. Ct. 53.

The Court of Appeals went even further and held that although the Current Tax Payment Act of 1943

was a relief provision it, nevertheless, should be construed to the taxpayer's detriment. It has long been established that a relief provision can never be construed to impose an additional burden on taxpayers or to deprive them of protection already afforded by existing law. *Bowcit Teller & Co.* v. *United States*, 283 U.S. 258, 75 L. Ed. 1018, 9 AFTR 1421; *Helvering* v. *Bliss*, 293 U.S. 144, 79 L. Ed. 246, 14 AFTR 668; *Colson Corporation*, 5 T.C. 1035, 1040; *Carter Mullaly et al., Trustees*, 5 T.C. 1379; *Fain Drilling Co.*, 8 T.C. 1174, 1176-1177; and Section 3.09, Mertens, *Law of Federal Income Taxation*.

The Court of Appeals' erroneous holding that the Current Tax Payment Act did remove the statute of limitations until the end of time on more than Five Billion Dollars of reported and assessed liability is the clearest sort of judicial legislation in direct disregard of the Supreme Court's admonition that such legislation by the courts is not proper. See Mertens, *Law of Federal Income Taxation*, Section 3.05 and the authorities there collated. This Court holds that the courts must "avoid usurpation of" legislative power and points out that the Judiciary must not legislate when "the remedy lies with the lawmaking authority, and not with the court." *Crooks* v. *Harrelson*, 282 U.S. 55, 60, 75 L. Ed. 156, 51 S. Ct. 49.

The judicial legislation in the instant case is doubly erroneous because (1) under the Supreme Court opinions the Court of Appeals is not authorized to enact such legislation and (2) it is self-evident that if Congress had been requested to repeal the statute of limitations on more than Five Billion Dollars of reported and assessed liability the request would have been sum-

marily rejected. See *Rothensies* v. *Electric Storage Battery Co., supra,* and *United States* v. *Updike, supra.*

The Court below ignored *Curd* v. *United States,* 1 AFTR 2d 678 (D.C. S.D. Fla., 1957) in which an injunction was granted against collecting 1942 liability more than six years after the original assessment. The situation in *Curd* was identical to that in the instant case except (1) the taxpayer sought an injunction and (2) the 1942 liability had not been overpaid. The Fifth Circuit held that the statute of limitations issue should be raised as a defense on the merits, as it was done in this case, rather than in a suit for injunctive relief. *Curd* v. *United States,* 257 F. 2d 347, 2 AFTR 2d. 5111 (CA 5, 1958).

In direct disregard and violation of this Court's clearest possible holdings to the contrary, the Court of Appeals has wrongly decided the instant case by holding (1) that the Current Tax Payment Act of 1943 by implication repealed the six-year statute of limitations when admittedly it did not deal with the statute of limitations at all, (2) that a relief provision must be construed to inflict injury on a taxpayer to whom by its express terms it "shall not apply", and (3) that the Court of Appeals is entitled to enact legislation which concededly the Congress did not consider or pass upon. *Gould* v. *Gould, supra, Rothensies* v. *Electric Storage Battery Co., supra, United States* v. *Updike, supra, Bonwit Teller & Co.* v. *United States, supra, Helvering* v. *Bliss, supra,* and *Crooks* v. *Harrelson, supra.* Such direct holdings in disregard of the authority of this Court can lead only to chaos with respect to more than Five Billion Dollars of reported and assessed liability for the years 1942 and 1943 if not decisively dealt with by the Supreme Court.

2. Even though the fully paid jeopardy assessments specifically included the full balance of the 1942 liability involved, as stated in writing by the Commissioner, the Court of Appeals has held that payment did not constitute satisfaction because the liability was "erroneously labeled," and proceeded to establish a wholly new rule of law to this effect: "A jeopardy assessment does not purport to be a final statement of a balance due to the Government."

1939 IRC 273(a) is the sole authority for jeopardy assessments and mandatorily requires that all known liability shall be included when such an assessment is made. The explicit requirement of 273(a) is as follows:

> "(a) Authority for Making.—If the Commissioner believes that the assessment or collection of a deficiency will be jeopardized by delay, he shall immediately assess such deficiency (together with all interest, additional amounts, or additions to the tax provided for by law) and notice and demand shall be made by the collector for the payment thereof."

Regulations 111, Sec. 29.273-1 confirm the fact that under Section 273(a) the Commissioner "is required to assess" all known liability when a jeopardy assessment is imposed.

The Court of Appeals overlooked and did not mention 273(a) and misread 1939 IRC 273(c) and thereby reached its erroneous conclusion contrary to the mandatory requirements for the imposition of jeopardy assessments. Section 273(c) deals only with a situation that does not exist in this case, namely, the imposition of a jeopardy assessment after a deficiency notice has been sent. Even in such a situation the Commis-

sioner is required to include all known liability in the jeopardy assessment regardless of the amount that may have been included in the deficiency notice. See 1939 IRC 273(c) and Regulations 111, Sec. 29.273-1.

The jeopardy assessment is the most drastic power accorded to the Commissioner by the Congress. It has been correctly described as a strangle hold over the taxpayer's assets, having the most serious consequences, in Mertens, *Law of Federal Income Taxation*, Section 49.144, as follows:

> "* * * There is little doubt but what a jeopardy assessment is a statutory label for the sovereign's strangle hold on a taxpayer's assets."

It is obvious why 1939 IRC 273(a) requires that all known liability must be included when resort is had to jeopardy assessments. The holding below that this drastic remedy may be applied piecemeal is directly contrary to the express provisions of 273(a) and in violation of every principle of fair administration of our tax laws. Consequently, it is of importance that this Court strike down such a wholly erroneous rule of law which has never heretofore been enunciated in any case.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 8406

UNITED STATES OF AMERICA, *Appellee*,

v.

FRANKLIN MCKENZIE DAVISON, *Appellant*.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, AT ALEXANDRIA. ALBERT V. BRYAN, DISTRICT JUDGE.

(Argued October 19, 1961. Decided February 7, 1962.)

Before SOBELOFF, Chief Judge, and SOPER and BOREMAN, Circuit Judges.

David R. Shelton for Appellant, and Douglas A. Kahn, Attorney, Department of Justice, (Louis F. Oberdorfer, Assistant Attorney General; John B. Jones, Jr., Acting Assistant Attorney General; Meyer Rothwacks and Robert N. Anderson, Attorneys, Department of Justice, and Claude V. Spratley, Jr., United States Attorney, on brief) for Appellee.

BOREMAN, Circuit Judge:

This is a companion case to *United States* v. *Hardy*, No. 8402, this day decided, the opinions in *Hardy* and the in-

stant case being filed simultaneously. The issues presented in the two cases are almost identical. In broad outline, this is an appeal from a judgment rendered against Franklin McKenzie Davison of Alexandria, Virginia, in favor of the United States for $35,527.23 plus interest, including the amounts as follows: (1) $10,777.75 interest on the 1942 tax liability included in an assessment of May 2, 1952; (2) $16,945.19 for 1947 liability; and (3) $7,804.29 for 1951 liability. Liability for the payment of 1947 and 1951 taxes is not denied but it is claimed that Davison made payments amounting to $36,814.69 which were over and above his actual liability and that such overpayment should be credited against the 1947 and 1951 taxes with the balance refunded to taxpayer.

The District Court found facts, most of which were stipulated, as follows: On March 15, 1943, taxpayer filed his income tax return for 1942, revealing a tax liability for that year of $39,267.11 which was duly assessed in March or April 1943. When the return was filed a 25% payment of the tax ($9,816.77) was made, and three months later a second 25% installment ($9,816.78) was paid. By the time the third quarterly payment would have been due but for the enactment of the Current Tax Payment Act, 57 Stat. 126 (1943), that act had become effective; hence, no further payments of 1942 tax were made under the original assessment. Davison's income tax return for 1943 was filed in March 1944 showing a tax of $50,934.96 based upon 1943 income. In accordance with the Current Tax Payment Act, § 6(a), taxpayer added the unforgiven one quarter of his reported 1942 liability ($9,816.78), making a total 1943 liability of $60,751.74. To meet that liability Davison made cash payments of $41,118.19 and offset the unpaid balance ($19,633.55) against the amounts paid the previous year toward his reported 1942 tax liability.

In 1947 the Commissioner began an investigation of taxpayer's returns for the years 1942 through 1947, and on

November 21, 1951, made a jeopardy assessment of $220,123.46 covering the tax liability for those years. An explanation of the assessment was given in the 90-day letter of December 14, 1951, which indicated liability in the following amounts:

Year	Deficiency	50% Penalty	5% Penalty	Interest to Nov. 21, 1951
1942	$ 5,051.76	$ 2,525.88		$ 2,631.90
1943	16,351.23	3,267.23		7,537.69
1944	16,545.04	8,272.52		6,634.33
1945	29,125.24	14,562.62		9,931.31
1946	43,176.98	21,588.49		12,132.14
1947	16,356.67		$ 817.83	3,614.60
	$126,606.92	$ 50,216.74	$ 817.83	$ 42,481.97

Total tax, penalties and interest $220,123.46

Taxpayer paid $199,334.36 plus interest covering the liabilities for 1942 through 1946 covered in the 90-day letter of December 14, 1951. That sum included $9,816.78 designated in the 90-day letter as "Reassessed portion of 1942 tax." It has been stipulated that the fraud penalties with respect to the 1942 tax return were properly assessed and paid.

On May 2, 1952, the Commissioner made a new assessment of $30,411.31 which included the discovered unpaid balance of the 1942 tax liability plus interest thereon of $10,777.75. In December 1953 the unpaid 1942 tax plus interest of $1,862.13 and a filing fee were paid, but no part of the assessed interest of $10,777.75 has been paid. The Commissioner originally filed the present action to collect, among other amounts due, $19,633.56, which represents one-half of the 1942 tax then thought to be unpaid. It was subsequently discovered that all of the 1942 tax had been paid and on November 4, 1958, the complaint was amended asserting a claim for the unpaid interest of $10,777.75 plus the amounts conceded to be due for 1947 and 1951.

Davison contends that he has now paid 150% of the 1942 tax liability disclosed on his return for that year. It is conceded that because of his fraud that year he is liable for all of his 1942 income tax, the forgiveness feature of the Current Tax Payment Act not applying in cases such as this. Payments are claimed to have been made as follows:

a. 25%, amounting to $9,816.77, paid on March 15, 1943;

b. 25%, amounting to $9,816.78, paid in June 1943;

c. 25%, amounting to $9,816.78, by reporting on his 1943 return and paying $9,816.78 of 1942 liability against the balance of the $39,267.11 assessed against him for 1942;

d. 25%, amounting to $9,816.78, plus interest made as part of the settlement of the jeopardy assessment. (The 90-day letter explaining the assessment included a statement, "Balance (Reassessed portion of 1942 tax).")

e. In December 1953 taxpayer made another payment equal to 50% of his reported 1942 liability.

As has already been pointed out in the *Hardy* case, there was actually no payment of 1942 tax by adding one-fourth thereof to the 1943 tax liability, then taking a credit on the total 1943 liability (including one-fourth of the 1942 tax) equal to one-half of the amount of the reported 1942 tax. Instead of paying one-fourth of the 1942 tax as contended, an amount equal to one-fourth of the 1942 tax was actually credited against 1943 liability (exclusive of any 1942 tax). Thus the amount assessed in November 1951 and referred to in the 90-day letter as "Reassessed portion of 1942 tax" was actually that portion of the 1943 tax against which the credit had been taken and which was not paid until the payment of the jeopardy assessment. Contrary to taxpayer's argument, there has been no material overpayment of 1942 taxes. This is demonstrated as follows: It is acknowledged that the Current Tax Payment Act of 1943

does not apply to Davison's 1942 tax; hence, all of his reported tax for the years 1942 and 1943 must be paid:

$39,267.11	Reported 1942 tax on 1942 income
50,934.96	Reported 1943 tax on 1943 income
$90,202.07	Total tax due for 1942 and 1943 (less fraud deficiencies and penalties not involved in this litigation)

Payments toward the total combined tax liability for 1942 and 1943 were made as follows:

$19,633.55	One-half reported 1942 tax paid in March and June 1943
41,118.19	Paid during 1943 and 1944 in discharge of 1943 tax liability
19,633.56	Paid on December 31, 1953, in partial discharge of May 2, 1952, assessment
9,816.78	Portion of jeopardy assessment in November 1951 (this is the sum labeled "Reassessed portion of 1942 tax," but for purposes of this demonstration, it makes no difference whether it is labeled 1942 or 1943 tax since the tax liability for both years is here combined)
$90,202.08	Total funds actually paid in discharge of reported 1942-1943 tax liability.

Thus it is seen that the only overpayment for the combined two-year period is one cent ($.01). Unlike the situation in the *Hardy* case, however, all of the principal portion of tax due for 1942 has been paid by Davison.

The $10,777.75 interest on the 1942 tax was properly assessed for the reasons discussed in the *Hardy* case with respect to the legality of the May 2, 1952, assessment. There we held that a person cannot take advantage of his own fraud and thus escape the payment of 1942 taxes,

admittedly due, plus interest thereon. It is suggested by taxpayer that since the original complaint in this action did not include a demand for the $10,777.75 interest assessed on May 2, 1952, and that since no effort was made to collect that portion of the assessment prior to the expiration of the six-year statute of limitation (Int. Rev. Code of 1939 § 276(c)), the collection was barred. The District Court ably answered this contention:

> "This obligation [for $10,777.75 interest] is not barred by time . . . because the amendment to the complaint which brought the interest claim into the suit for the first time, is retroactive to the commencement of the action on May 1, 1958. Federal Rules of Civil Procedure, Rule 15(c). Clearly, the interest claim arose out of the transaction, i. e., the assessment of 1942 taxes, pleaded in the original complaint . . . ."

The same argument is made in this case as in *Hardy* with respect to the Government's failure to call as witnesses employees of the Internal Revenue Service who were in the court room at the trial. It is said that those employees who had handled the Davison account had complete knowledge of his tax payments in the years 1942 through 1947 yet were not called by the Government as witnesses. For the reasons stated in *United States* v. *Hardy*, we reject this contention as being without merit. The cases relied upon by taxpayer to support his argument are those mentioned and distinguished in *Hardy*.

Davison's counterclaim for $36,814.69 plus interest consists of the following items claimed to have been unlawfully collected from him by the Commissioner:

> "1. $15,319.00, inclusive of interest, of 1942 liability assessed in 1943 and exacted from Mr. Davison on December 31, 1952, despite the fact that in 1949 its collection had become barred by 1939 I.R.C. 276(c).

"2. $21,495.69, inclusive of interest, of 1942 liability assessed in 1943, allegedly 'reassessed' on May 2, 1952 and exacted from Mr. Davison on December 31, 1953, despite the fact (a) that it had previously been fully paid and (b) that in 1949 its collection or 'reassessment' had become barred by 1939 I.R.C. 276(c)."

The first claim of taxpayer (for $15,319 which represents $9,816.78 plus interest) is rejected because it is based upon the clearly erroneous view that the sum of $9,816.78, assessed on November 21, 1951, as part of Davison's 1943 liability, was actually a payment on his 1942 tax account. As we have indicated in this opinion and explained more fully in Hardy, the jeopardy assessment of November 21, 1951, did not include the 1942 tax liability which was reported by taxpayer on his original return filed in 1943. In other words, at that time (November 1951) no part of the then unpaid balance of one-half the reported 1942 tax liability was assessed or paid.

The second of Davison's claims raises the same questions previously discussed in this opinion as well as in *United States* v. *Hardy*. This claim for $21,459.69 is based on the assertion that the May 2, 1952, "reassessment" was illegal because the tax had been paid and after its collection had been barred by the statute of limitations. We have already shown that payment of the balance of 1942 tax was not made until December 1953, after and pursuant to the May 2, 1952, assessment. With respect to the legality of the "reassessment" of 1942 tax, we rely upon the rule stated in *United States* v. *Hardy*. Actually, however, insofar as both claims are concerned, the taxpayer is barred from collecting any refund by the provisions of Int. Rev. Code of 1939 § 322(b). The payments which defendant now claims should be refunded were made on December 31, 1952, and December 31, 1953, respectively. The claim for refund was filed June 3, 1958, and not within the statutory period.

For the foregoing reasons, the judgment below is

Affirmed.

Judgment

Filed and Entered February 7, 1962

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 8406

UNITED STATES OF AMERICA, *Appellee*,

v.

FRANKLIN McKENZIE DAVISON, *Appellant*.

APPEAL FROM the United States District Court for the Eastern District of Virginia.

THIS CAUSE came on to be heard on the record from the United States District Court for the Eastern District of Virginia, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed.

SIMON E. SOBELOFF
Chief Judge, Fourth Circuit

MORRIS A. SOPER
United States Circuit Judge

HERBERT S. BOREMAN
United States Circuit Judge

Filed Feb. 7, 1962
R. M. F. WILLIAMS, JR.
Clerk

Order Denying Rehearing

Filed and Entered March 22, 1962

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 8406

UNITED STATES OF AMERICA, *Appellee*,

v.

FRANKLIN McKENZIE DAVISON, *Appellant*.

ORDER

Upon consideration of the Petition of Franklin McKenzie Davison for rehearing filed herein on March 3, 1962, it is ordered that said Petition be and the same is hereby denied.

SIMON E. SOBELOFF
Chief Judge, Fourth Circuit

MORRIS A. SOPER
United States Circuit Judge

HERBERT S. BOREMAN
United States Circuit Judge

Filed Mar. 22, 1962
R. M. F. WILLIAMS, JR.
Clerk

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In the Supreme Court of the United States

October Term, 1962

[redacted] DAVISON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ARCHIBALD COX,
Solicitor General,

JOSEPH B. JOSEPH, JR.,
Acting Assistant Attorney General,

[redacted] M. ANDERSON,
RICHARD J. HERMAN,
Attorneys,
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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 904

FRANKLIN McKENZIE DAVISON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

This is a companion case to *William J. Hardy* v. *United States*, No. 905, this Term, and involves a situation identical in all material respects with the *Hardy* case. In 1943, taxpayer filed a timely return for the calendar year 1942, revealing a federal income tax liability in the amount of $39,267.11. That amount was assessed in March or April, 1943. Only 50% of the assessment was paid, while the remaining 50%, or $19,633.56, was supposedly discharged pursuant to the forgiveness provision in Sec-

tion 6(a) of the Current Tax Payment Act of 1943 c. 120, 57 Stat. 126, 26 U.S.C. 1946 ed., Sec. 1622, note, which became effective as of September 1, 1943. Subsequently it was discovered that taxpayer committed fraud in his 1942 return, as a result of which additions to the tax for that year were included in a jeopardy assessment made for the years 1942 to 1947 on November 21, 1951. By the express terms of Section 6(a), taxpayer's fraud rendered the forgiveness feature of the Act inapplicable; the unpaid portion of his 1942 taxes had therefore been improperly discharged. On May 2, 1952, the Commissioner reassessed this unpaid portion of the 1942 taxes plus interest thereon of $10,777.75. In December 1953, taxpayer paid that part of the assessment which represented the unpaid 1942 tax, but he has never paid the assessed interest. The present action was brought on May 1, 1958, to collect amounts due including that part of the 1942 tax thought to be owing, plus interest. It was subsequently discovered that all of the 1942 tax had been paid, and the government's complaint was amended to include only the claim for interest for 1942 which had not been paid. (Pet. 2a-3a.)

Since the controlling principles in the present case are the same as those in the *Hardy* case, the argument in the government's brief in opposition in *Hardy* is adopted here by reference. As in the *Hardy* case, the court of appeals agreed with the district court that the amount claimed by the government to be owing had never been paid by the taxpayer and that the assessment made on May 2, 1952, was

not barred by the statute of limitations or otherwise prevented because of a previous jeopardy assessment made on November 21, 1951 (Pet. App. 4a-6a). Taxpayer's argument here is identical with the taxpayer's argument in *Hardy*. The government contends, and the court of appeals has so held, that (1) there was no binding agreement between taxpayer and the government as to his 1942 tax liability merely because he paid an assessed deficiency for that year since the statutory requisites for a closing agreement or compromise (Sections 3760 and 3761 of the Internal Revenue Code of 1939) were not fulfilled, and (2) Congress intended that where there was fraud in reporting 1942 tax liability the portion of the tax dischcarged pursuant to the Current Tax Payment Act could be reassessed and collected at any time, *i.e.*, it was to be treated pursuant to the provisions of Section 276(a) of the 1939 Code in the same manner as a fraud deficiency for purposes of the statute of limitations. Accordingly, the government is not barred from collecting the interest involved here either by virtue of the statute of limitations or because of taxpayer's payment of his 1942 taxes.

The petition for a writ of certiorari should therefore be denied.

Respectfully submitted,

ARCHIBALD COX,
Solicitor General.

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ROBERT N. ANDERSON,
RICHARD J. HEIMAN,
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MAY 1962.

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